ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 06-2943

COUNCIL TREE COMMUNICATIONS, INC., BETHEL NATIVE CORPORATION, AND THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

Petitioners Council Tree Communications, Inc. ("Council Tree"), Bethel Native Corporation ("Bethel Native"), and the Minority Media and Telecommunications Council ("MMTC") seek review of two orders of the Federal Communications Commission. The Second Report and Order ("*Second R&O*")

was published in the Federal Register on May 4, 2006.[1] The *Reconsideration Order* was published in the Federal Register on June 14, 2006.[2] Petitioners filed a petition for review of both orders on June 7, 2006. Because neither order was final and reviewable as to petitioners until June 14, 2006, *see West Penn Power Co. v. EPA*, 860 F.2d 581, 586-87 (3d Cir. 1988), this Court lacks jurisdiction to consider petitioners' challenge under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 *et seq.*

STATEMENT OF ISSUES

Petitioners challenge the *Second R&O*, in which the Federal Communications Commission adopted regulations after a notice-and-comment process, and the *Reconsideration Order*, in which the Commission reconsidered the *Second R&O*. The case presents the following issues:

1. Whether the Court lacks jurisdiction to consider petitioners' challenges to the *Second R&O* and the *Reconsideration Order*, because, by filing their petition for review before the *Reconsideration Order* was published in the Federal Register and never thereafter refiling, petitioners failed to file a timely challenge to those orders.

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[1] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Second Report and Order and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 4753 (2006), 71 Fed. Reg. 26245 (May 4, 2006) (JA 82) ("*Second R&O*").

[2] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Order on Reconsideration of the Second Report and Order, 21 FCC Rcd 6703 (2006), 71 Fed. Reg. 34272 (June 14, 2006) (JA 142) ("*Reconsideration Order*").

2. Whether the rules adopted in the *Second R&O* and the *Reconsideration Order* are a lawful logical outgrowth of the proposals on which the Commission sought public comment.

3. Whether the rules adopted in the *Second R&O* and the *Reconsideration Order* are the product of reasoned decisionmaking and consistent with the auction provisions of the Communications Act.

4. Whether the Commission complied with the requirements of the Regulatory Flexibility Act.

STATEMENT OF THE CASE

In the *Second R&O* and the *Reconsideration Order*, the Commission revised its rules governing eligibility for "designated entity" or "DE" bidding credits, which enable small businesses, at auction, to obtain certain wireless licenses at a discount. These revisions stemmed from concerns expressed by petitioners and others that the old DE rules did not "prevent companies from circumventing the objectives of the designated entity eligibility rules."[3] Petitioner Council Tree had proposed specific reforms to address these concerns, and the notice initiating this proceeding used the elements of Council Tree's proposal as a possible response.

The record showed substantial agreement that the DE rules were in need of reform. However, the record showed widespread disagreement on the details of Council Tree's proposal. At the same time, virtually all commenters agreed that,

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[3] *Second R&O* ¶ 6 (JA 65).

whatever reforms were adopted, the auction for Advanced Wireless Service ("AWS") spectrum scheduled for the summer of 2006 should not be delayed.

The Commission chose to defer action on Council Tree's specific proposals to a further round of rulemaking, while immediately adopting measures that were needed to allow the AWS auction to more appropriately further the goals of the DE program. First, the FCC tightened its DE rules regarding lease and resale arrangements to ensure that every recipient of DE benefits "uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public." *Reconsideration Order* ¶ 3 (JA 144). Second, the agency strengthened its "unjust enrichment" rules – which recapture DE benefits when ineligible entities acquire control of, or impermissible influence over, DEs – "to better deter entities from attempting to circumvent [the] designated entity eligibility requirements." *Id.* ¶ 4 (JA 144).

The AWS auction, which was conducted with these rules in place, raised more than $13.7 billion in winning bids.[4] DEs constituted 57 of the 104 winning bidders, and two DEs – including one in which petitioner Council Tree's principals have substantial involvement – were among the top ten winning bidders.[5] Petitioners nevertheless challenge the rules and seek to set aside the auction.

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[4] Federal Communications Commission, Auctions Summary, http://wireless.fcc.gov/auctions/default.htm?job:auctions_all (last updated 10/10/06).

[5] Auction of Advanced Wireless Services Licenses Closes, *Public Notice*, DA 06-1882, Attachment A (rel. September 20, 2006) ("*Auction Closure Notice*").

STATEMENT OF FACTS

I. Background

The Auction Program. Since 1993, the Communications Act has required the FCC to award most spectrum licenses "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). The statute directs the Commission, in designing auction procedures, to seek to promote various – sometimes competing – objectives, including the development and deployment of new technologies and services for the benefit of the public "without administrative or judicial delays"; the promotion of economic opportunity and competition by avoiding "excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including [designated entities, such as] small businesses [and] rural telephone companies"; and the "avoidance of unjust enrichment." *Id.* § 309(j)(3)(A) – (C); *see also id.* § 309(j)(4) (directing the Commission to prescribe regulations to implement the objectives of "paragraph (3)").[6] In implementing the auctions program, the Commission has sought "to find a reasonable balance" among the statute's competing goals. *Second R&O* ¶ 8 (JA 85).

The Commission's primary method of promoting designated-entity participation in spectrum license auctions has been to award bidding credits – "percentage discounts on winning bid amounts" – to small-business applicants.

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[6] Although the Commission's rules define "designated entities" as "small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies" (47 C.F.R. § 1.2110(a)), after the Supreme Court decided *Adarand Constructors v. Pena*, 515 U.S. 200 (1995), DE benefits have been available only to small businesses, including rural telephone companies. *See Second R&O* ¶ 3 n.8 (JA 84).

Second R&O ¶ 9 (JA 85-86). To qualify for these (and other) benefits, an applicant must demonstrate that its gross revenues, in combination with those of its "attributable" interest holders, fall below certain service-specific caps. *Id.* (citing 47 C.F.R. § 1.2110(b)). Since 2000, the FCC has applied a "controlling interest" standard to all pertinent services when making attribution determinations. *Second R&O* ¶ 12 (JA 87-88). Under that standard, the Commission attributes to an applicant its own gross revenues, as well as those of its controlling interests, its affiliates, and the affiliates of its controlling interests. *Id.*[7]

The Commission has sought to ensure that small business benefits are available only to bona fide small businesses. To this end, the agency has engaged in "numerous rulemakings and adjudicatory investigations to prevent companies from circumventing the objectives of the designated entity eligibility rules."[8] For example, the Commission has adopted unjust-enrichment rules, which require a DE that has benefited from bidding credits to return some or all of those benefits if it transfers its license to a non-DE or otherwise loses its eligibility for such

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[7] A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have either *de jure* or *de facto* control over the licensee. *De jure* control typically exists where the controlling party or group holds greater than 50% of a corporation's voting stock, or more than half of a partnership's general partnership interests. *De facto* control is determined on a case-by-case basis upon consideration of numerous factors, including control of day-to-day operations, policy decisions, and personnel matters. *Id.* ¶ 12 (JA 87-88).

[8] *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures* (WT Docket No. 05-211), Further Notice of Proposed Rulemaking, 21 FCC Rcd 1753 (¶ 6) (2006) (JA 64) ("*Further Notice*").

benefits. At various times, the auction program rules had required repayment of the entire bidding credit if the licensee lost its DE eligibility during the 10-year license term.[9] At the time the Commission commenced the rulemaking on review here, its rules required repayment if a licensee lost its eligibility during the first five years after winning the license.[10]

Advanced Wireless Service. Growth in demand for mobile wireless services, along with the rise of the Internet, has created a need for additional spectrum and advanced technologies capable of providing Advanced Wireless Services ("AWS") – including wireless Internet access and other high-speed information and entertainment services. Aware of studies indicating that America's "broadband infrastructure lags dramatically behind other industrialized

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[9] *See* Sixth Report and Order, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 11 FCC Rcd 136, 180 (1995) (governing Auctions 5, 10, and 11, and requiring total reimbursement of bidding credits if eligibility is lost any time during the 10-year license term). *See also* Report and Order, *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, 10918-19 (1997) (governing Auction 14, and providing for 100% reimbursement for loss of eligibility during the first 5 years of the license terms, with declining reimbursement obligations for years 5 through 10).

[10] *See Reconsideration Order* ¶ 37 (JA 156) (noting that unjust enrichment period had been five years prior to the revisions adopted in the *Second R&O*).

nations,"[11] the Commission since 2002 has allocated spectrum and adopted service rules for the provision of AWS service.[12]

The Commission was assisted in that effort in 2004, when Congress passed the Commercial Spectrum Enhancement Act ("CSEA").[13] The CSEA established a trust fund for relocating existing government users of the AWS spectrum and provided a process by which the FCC and the Commerce Department's National Telecommunications and Information Administration ("NTIA") would collaborate in making AWS spectrum available to the public at auction. After coordinating with NTIA, the Commission scheduled an auction of the AWS spectrum for the summer of 2006. The proposed AWS auction – involving spectrum adjacent (and functionally equivalent) to that previously made available for Personal Communications Services ("PCS") – was a "landmark event," representing "the first auction in almost 10 years of a nationwide footprint of spectrum" ideal both for the provision of new broadband applications and improved voice services.[14]

II. The Rulemaking On Review

In the months leading up to the AWS auction, FCC officials had become aware that, "[i]n recent auctions, some entities have put themselves forward as

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[11] *Reconsideration Order* (Statement of Commissioner Copps) (JA 167).

[12] *See generally Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands* (WT Docket No. 02-353), FCC 05-149, Order on Reconsideration, at ¶¶ 2-3 (2005) ("*AWS Service Rules Reconsideration Order*").

[13] Pub. L. No. 108-494, Title II, 118 Stat. 3986 (2004) (codified at various sections of Title 47 of the United States Code).

[14] *Further Notice* (Statement of Commissioner Adelstein) (JA 80).

small companies in order to qualify for auction discounts * * * having already entered into agreements to lease the spectrum rights they win to industry giants that do not qualify for discounts themselves." *Further Notice* (Statement of Commissioner Copps) (JA 79). And well-publicized litigation was pending involving allegations that certain designated entities had been "established for the purpose of acquir[ing] federally discounted licenses as investments to be later sold for profit in the after-market, and not for the legitimate objective of develop[ing] or offer[ing] spectrum services under acquired licenses, or to operate actual business operations." *United States v. Gabelli*, 345 F. Supp. 2d 313, 321-22 (S.D.N.Y. 2004).[15]

When petitioner Council Tree submitted a proposal to tighten the DE eligibility rules by denying such benefits to DEs that have material operational or financial relationships with large in-region wireless carriers, the Commission took the "elements" of Council Tree's proposal as a point of departure to initiate further rulemaking proceedings to repair the DE rules in advance of the auction. *Further Notice* ¶ 1 (JA 61-62).

The Rulemaking Record. The rulemaking proceedings generated broad agreement that the Commission's DE program did not sufficiently ensure that DE benefits go to their intended beneficiaries and that, in petitioner MMTC's words,

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[15] *See* John R. Wilke, *Gabelli, U.S. Discuss Settlement In Fraud Case*, Wall Street J., June 1, 2006, at A3.

reforms were needed "to restore the legitimacy of the DE program."[16] *See generally Second R&O* ¶ 75 (JA 108) (cataloguing comments). Commenters, including petitioners Council Tree and MMTC, argued that leasing and resale arrangements between DEs and other entities could be ripe for abuse.[17] The Department of Justice noted that some DEs "had not launched commercial services to end-user customers or other wireless carriers but only provided roaming services" to affiliated large carriers; the Department asserted that when such a carrier "controls who can lease or purchase the DE's licenses or who can roam or receive other services using the DE's spectrum, it substitutes its business judgment for that of the DE."[18] Commenters also expressed concern about license "flipping" – the practice of using bidding credits or other DE benefits to win licenses at

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[16] Comments of Minority Media and Telecommunications Council ("MMTC Comments"), dated February 24, 2006, at 3 (JA 574).

[17] Comments of Council Tree Communications, Inc., dated February 24, 2006, at vii-viii, 52 (JA 439-40, 492) ("Council Tree Comments"); Reply Comments of Council Tree Communications, Inc., dated March 3, 2006, at 17-18, 31 (JA 873-74, 887) ("Council Tree Reply"); MMTC Comments at 6 & n.16 (JA 577-78). *See also* Comments of the NTCH, Inc. dba Clear Talk, dated February 24, 2006, at 2-3, 8 (JA 663-64, 669) ("NTCH Comments"); Comments of Wirefree Partners III, LLC, dated February 24, 2006, at 8-10 (JA 759-61) ("Wirefree Partners Comments"); Letter, dated March 17, 2006, from Telecommunications and Media Enforcement Section, U.S. Dept. of Justice, Antitrust Division, to FCC Secretary, at 4-5 (JA 1052-53) ("DOJ Ex Parte").

[18] DOJ Ex Parte at 4-5 (JA 1052-53).

discounted prices, and then selling or otherwise transferring those licenses to others instead of using them to provide service to the public.[19]

There was significant disagreement on what shape the reforms should take. For example, although Council Tree had proposed to extend DE restrictions to prohibit the award of bidding credits to entities with "material relationship[s]" with "large in-region incumbent wireless service provider[s],"[20] many commenters disagreed on the appropriate size for entities that should be limited in partnering with DEs. Several commenters asserted that Council Tree's specific proposal to define "large" in-region wireless carriers as those with over $5 billion in annual gross wireless revenues (*see Further Notice* ¶ 17 (JA 68)) was arbitrary – designed out of self-interest to preserve Council Tree's ability to maintain its partnering relationship with a carrier whose revenues were just below the cut-off, while prohibiting functionally indistinguishable partnering relationships.[21]

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[19] *See* NTCH Comments at 4 (JA 665); MMTC Comments at 12 n.28 (JA 583); Letter, dated March 23, 2006, from Harold Feld, Media Access Project, to FCC Secretary, at 2 (JA 1116). *See also Second R&O* (Statement of Commissioner Copps) (JA 137).

[20] *Further Notice* ¶ 1 (JA 61) (citing Letter, dated June 13, 2005, from Council Tree to FCC Secretary).

[21] Reply Comments of Cook Inlet Region, Inc., dated March 3, 2006, at 7-8 (JA 848-49); Letter, dated March 27, 2006, from Christine Enemark, counsel for Cook Inlet, to FCC Secretary, at 3 (JA 1123); Comments of T-Mobile USA, Inc., dated February 24, 2006, at 9 (JA 698). *See generally* Wirefree Partners Comments at 11 (JA 762); Comments of Verizon Wireless, dated February 24, 2006, at 19 (JA 748); Comments of the Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies, dated February 24, 2006, at 3 (JA 678) ("RTG/OPASTCO Comments"); *Second R&O* ¶ 57 (JA 102).

Commenters also disagreed about what types of entities should be limited in partnering with DEs – whether the restrictions should apply only to in-region wireless carriers (as Council Tree proposed), or include other classes of investors as well. *See generally Second R&O* ¶ 58 (JA 102) (cataloguing comments). A number of commenters argued that, if the aim was to ensure that DE benefits go only to bona fide DEs, any eligibility restrictions should apply to all investors.[22]

Disagreement among commenters regarding the precise scope of needed reforms, in the end, did not translate into requests that the AWS auction be delayed. To the contrary, there was near unanimity that the auction should proceed as scheduled. Council Tree itself argued that the AWS auction is "a critical opportunity for smaller carriers and new entrants to acquire access to vital spectrum resources * * * [and] should not be delayed."[23] Representatives of other small entities concurred, noting that, in their experience, "spectrum prices tend to go up when auctions are delayed, oftentimes putting spectrum out of reach for small carriers with limited resources."[24]

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[22] *See* Comments of Dobson Communications Corp., dated February 24, 2006, at 1-4 (JA 525-28); Verizon Wireless Comments at 16-17 (JA 745-46); Comments of Centennial Communications Corp., dated February 23, 2006, at 7-8 (JA 359-60); DOJ Ex Parte at 6 (JA 1054); Comments of CTIA – The Wireless Association, dated February 24, 2006, at 4 (JA 511); Reply Comments of T-Mobile USA, Inc., dated March 3, 2006, at 6-7 (JA 811-12); Reply Comments of Cingular Wireless LLC, dated March 3, 2006, at 2 (JA 833).

[23] Council Tree Comments at 61 (JA 501).

[24] RTG/OPASTCO Comments at 6 (JA 681).

The *Second R&O*. Faced with a substantial record suggesting that the existing DE rules were inadequate, with divergent views on the wisdom of imposing additional restrictions predicated upon the size and/or line-of-business of prospective non-DE partners, and with widespread agreement that the AWS auction should not be delayed, the Commission decided to defer action on Council Tree's specific proposal to a further round of rulemaking, while immediately adopting certain measures that, the agency concluded, were needed to allow the AWS auction to more appropriately further the goals of the DE program. *See Second R&O* ¶¶ 3-5, 6 (JA 83-85).[25]

First, the FCC stressed that "'Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.'"[26] In light of

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[25] In a separate Public Notice, issued shortly after the *Second R&O*, the Commission moved the starting date for the AWS auction from June 29, 2006, to August 9, 2006, to give potential applicants additional time to take the rule revisions into account. Auction of Advanced Wireless Services Licenses Rescheduled for August 9, 2006, Revised Schedule, Filing Requirements and Supplemental Procedure for Auction 66, *Public Notice*, FCC 06-71 (rel. May 19, 2006).

[26] *Second R&O* ¶ 24 (JA 92) (quoting *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets* (WT Docket No. 00-230), Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 17503 (¶ 82) (2004) ("*Secondary Markets Second Report and Order*")). *See* H.R. Rep. No. 103-111, at 257-58 (1993) (noting that "[t]he Committee anticipates that the Commission will use this authority [(to prevent unjust enrichment)] to deter speculation and participation in the licensing process by those who have no intention of offering service to the public").

that congressional intent, the Commission determined that certain agreements involving "the actual use of the designated entity's spectrum," "by their very nature, are generally inconsistent with an applicant's or licensee's ability to achieve or maintain designated entity eligibility." *Second R&O* ¶ 23 (JA 91). With respect to such agreements, "it is the agreement [itself], as opposed to the party with whom it is entered into," that violates Congress's goal that DEs use their benefits to become "facilities-based provider[s]." *Second R&O* ¶ 23 (JA 91).

The Commission found that agreements to lease and resell spectrum, in particular, implicated this concern in ways that were not alleviated by its existing rules. *Second R&O* ¶¶ 24, 25 (JA 92). Accordingly, the Commission provided (1) that a licensee would be *ineligible* for DE benefits if it has lease or resale agreements with one or more entities covering, on a cumulative basis, more than 50% of its spectrum under any license; and (2) that a DE that has lease or resale agreements with a single entity covering more than 25% of the DE's spectrum under any license must attribute the lessee's revenues to itself for purposes of determining eligibility for DE benefits. *Second R&O* ¶ 25 (JA 92).

Second, to complement the new lease/resale-related eligibility restrictions and to address concerns about license flipping, the Commission strengthened its unjust-enrichment rules – extending from five years to 10 years the period during which a DE will have to repay some or all of its bidding credits if it loses eligibility for those benefits. *Second R&O* ¶ 37 (JA 96). The Commission determined that this change was needed to deter "speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to

use bidding credits to obtain a license at a discount and later to sell it at the full market price for a windfall profit." *Id.* ¶ 36 (JA 96).

The *Reconsideration Order*. Petitioners sought administrative reconsideration of the rule changes the Commission had adopted in the *Second R&O*. *See Reconsideration Order* ¶ 1 n.2 (JA 142-43). In its *Reconsideration Order*, the Commission clarified the rules in various respects, but declined petitioners' request that it set aside the rule changes. The Commission addressed and rejected claims that it had violated the Administrative Procedure Act by allegedly providing insufficient notice of and opportunity for comment on the revised lease/resale and unjust-enrichment rules.[27] The Commission also addressed and rejected claims that the strengthened unjust-enrichment rules arbitrarily deny DEs access to needed capital and financing in violation of section 309(j).[28]

III. Subsequent Developments

On June 7, 2006, five days after the Commission released its *Reconsideration Order* but seven days before that order was published in the Federal Register, petitioners filed their petition for judicial review in this Court, along with an accompanying emergency motion asking the Court to stay the start of the AWS auction and the effective date of the revised DE rules.[29]

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[27] *Id.* ¶¶ 14-22, 31-35 (JA 149-51, 154-55).

[28] *Id.* ¶¶ 36-40 (JA 155-58).

[29] Petition for Review, 3d Circuit No. 06-2943, filed June 7, 2006; Emergency Motion for Stay Pending Review, 3d Circuit No. 06-2943, filed June 7, 2006.

Following briefing and oral argument, a panel of this Court denied petitioners' request for a stay. The panel "form[ed] no opinion" on the merits of petitioners' challenge at that point, but it found that "[t]he public interest * * * militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date." Order, 3rd Circuit No. 06-2943, filed June 29, 2006, at 5 n.1, 6 (*"Stay Denial Order"*).

The AWS auction commenced on August 9, 2006, and closed on September 18, 2006. The auction raised in excess of $13.7 billion in winning bids (net of bidding credits),[30] making it one of the most lucrative in the history of the Commission's auction program.[31] And contrary to petitioners' dire predictions, although non-DEs won a majority of the licenses and generated most of the winning bid revenues from the auction, DE participation in the auction was substantial. DEs constituted 100 of the 168 total qualified bidders and 57 of the 104 total winning bidders, and two DEs – including one in which petitioner Council Tree's principals have substantial involvement (*see* n.57, below) – were among the top ten winning bidders.[32]

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[30] *Auction Closure Notice*.

[31] Federal Communications Commission, Auctions Summary, http://wireless.fcc.gov/auctions/default.htm?job:auctions_all (last updated 10/10/06).

[32] *Auction Closure Notice*, Attachment A.

SUMMARY OF ARGUMENT

The Court should dismiss petitioners' challenge to the *Second R&O* and the *Reconsideration Order* because petitioners did not properly invoke the Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342, *et seq.* If the Court reaches the merits of petitioners' challenge, it should deny the petition for review.

1. The Court lacks jurisdiction to consider petitioners' challenge because petitioners never filed a timely petition for review of either the *Second R&O* or the *Reconsideration Order*. Both orders became final and reviewable as to petitioners on June 14, 2006, when the *Reconsideration Order* was published in the Federal Register. Petitioners filed their petition for review prematurely on June 7, 2006, and never refiled a timely petition for review thereafter.

2. Even if petitioners had filed a timely petition for review, they have failed on the merits to demonstrate that the Commission's revised DE eligibility rules violated the requirements either of the Administrative Procedure Act, the Communications Act, or the Regulatory Flexibility Act.

a. Contrary to petitioners' claims, the Commission's *Further Notice* provided sufficient notice of the subjects and issues addressed in the DE rulemaking to satisfy the APA standard. The Commission sought comment generally on ways to address abuse of the DE program. It specifically sought comment on eligibility restrictions based on leasing (and other) relationships. And it expressly sought comment on adjusting the unjust-enrichment rules, including the time period during which a DE would be subject to bidding credit repayment obligations.

b. The strengthened DE eligibility and unjust-enrichment rules that the Commission adopted reflect a reasonable balancing of competing statutory goals under section 309(j). That provision requires the Commission not only to take steps to ensure that small businesses have an "opportunity" to participate in the provision of spectrum-based services, but also to ensure that DEs actually use any regulatory benefits they receive for the provision of service to the public and are not unjustly enriched by selling or otherwise transferring their licenses – obtained at a discount – for full market value. The Commission adopted the revised rules to address abuses of the DE program, while reasonably predicting that those rules would not prevent legitimate small businesses from participating in the provision of wireless services. Petitioners put much stock in post-record statistics comparing the results of the AWS auction to earlier auctions. But petitioners ignore that these earlier auctions were full of DEs partnering with large wireless carriers, which petitioners themselves have claimed have no business obtaining DE benefits. More importantly, post-record AWS auction statistics are legally irrelevant because the lawfulness of agency action must be assessed on the basis of the record before it.

c. The Commission fully complied with the requirements of the Regulatory Flexibility Act ("RFA"). The *Further Notice* included an Initial Regulatory Flexibility Analysis as required by 5 U.S.C. § 603. The *Second R&O* included a Final Regulatory Flexibility Analysis as required by 5 U.S.C. § 604. And the *Reconsideration Order* addressed petitioners' subsequent criticisms

regarding compliance with the RFA. Together these actions demonstrate the reasonable, good faith effort that the RFA requires.

3. Finally, even if petitioners were to prevail on the merits, there is no basis for the Court to vacate the Commission's DE rules and set aside the AWS auction results. In the event that the Court determines that the Commission provided insufficient notice – or inadequate explanation – of the revised rules, it should exercise its discretion to remand the Commission's action without vacatur, and it should not take the extraordinary step of setting aside the auction – an action that would cause severe harm to the public interest.

STANDARD OF REVIEW

Insofar as petitioners challenge the FCC's interpretation of the Communications Act, the Court's review is governed by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But if the statute is silent or ambiguous with respect to the specific issue, "*Chevron* requires a federal court to accept the agency's [reasonable] construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005).

Petitioners also challenge the reasonableness of the FCC's decision to modify its DE rules. The Court must affirm that decision unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." 5 U.S.C. § 706(2)(A). This "deferential standard" of review "presume[s] the validity of agency action." *SBC Inc. v. FCC*, 414 F.3d 486, 496 (3d Cir. 2005) (internal quotations omitted). The agency "need only set forth the basis of its administrative action 'with such clarity as to be understandable'; it need not provide a detailed statement of its reasoning and conclusions." *Kamara v. Attorney General*, 420 F.3d 202, 212 (3d Cir. 2005) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Administrative decisions "of less than ideal clarity" will be upheld "if the agency's path may reasonably be discerned." *South Trenton Residents Against 29 v. FHA*, 176 F.3d 658, 666 (3d Cir. 1999) (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)). Moreover, judicial deference to the FCC's "expert policy judgment" is especially appropriate in cases like this one, where the "'subject matter * * * is technical, complex, and dynamic,'" *Brand X*, 125 S. Ct. at 2712 (quoting *National Cable & Telecommunications Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002)), and where the agency must make predictive judgments about market behavior within the industry it oversees, *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 814 (1978).

The Court determines *de novo* whether it has jurisdiction. *Tarrawally v. Ashcroft*, 338 F.3d 180, 184 (3d Cir. 2003).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO CONSIDER PETITIONERS' CHALLENGES BECAUSE THEIR PETITION FOR REVIEW IS INCURABLY PREMATURE

This Court lacks jurisdiction to consider petitioners' challenge to the *Second R&O* and the *Reconsideration Order* because petitioners never filed a timely petition for review with respect to either of those orders. As discussed below, both orders became final and reviewable as to petitioners on June 14, 2006 – the date the *Reconsideration Order* was published in the Federal Register.[33] Petitioners,

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[33] We acknowledge that, after an expedited briefing cycle, this Court concluded in its *Stay Denial Order* (at 3-4) that the *Reconsideration Order* was a "final order" and that the Court, alternatively, had "jurisdiction to consider [petitioners'] emergency motion [for stay]" under either the petition for review provisions (47 U.S.C. § 402(a), 28 U.S.C. §§ 2342, *et seq.*) or the All Writs Act (28 U.S.C. § 1651). The Court at that time was not presented with, and did not address, the precise question presented here – whether the petition for review was premature, because it was filed before the *Reconsideration Order* was published in the Federal Register. *See* Opposition of Federal Communications Commission to Emergency Motion for Stay Pending Review, 3d Circuit No. 06-2943, at 4 n.8 (June 15, 2006). Because the Court "is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio," *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952), and because law of the case principles apply only "to issues that were actually discussed by the court in the prior [ruling] and to issues decided by necessary implication," *Bridge v. United States Parole Comm'n*, 981 F.2d 97, 103 (3d Cir. 1992), the Court's alternative statement in the *Stay Denial Order* that it had jurisdiction under the petition for review provisions does not foreclose consideration of our jurisdictional argument here. *See also Public Interest Research Group of New Jersey v. Magnesium Elecktron, Inc.*, 123 F.3d 111, 116-19 (3d Cir. 1997) (declining to apply discretionary law of the case principles in derogation of "the federal courts' unyielding obligation to uphold statutory and constitutional limitations on jurisdiction").

however, filed their petition for review prematurely on June 7, 2006, and never refiled a timely petition for review thereafter.

The Court's jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342, *et seq.*, is limited to circumstances in which an aggrieved party (1) seeks review of a "final order[] of the Federal Communications Commission,"[34] and (2) files a petition for review "within 60 days *after* its entry."[35] The events that constitute "entry" of Commission orders for purposes of judicial review are defined by regulation. *See Consumer Electronics Ass'n v. FCC*, 247 F.3d 291, 296-97 (D.C. Cir. 2003); *Small Business In Telecommunications v. FCC*, 251 F.3d 1015, 1023-24 (D.C. Cir. 2001); *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 376-80 (D.C. Cir. 1985) (all applying the Commission's timing regulations in determining whether petitions for judicial review are timely under 28 U.S.C. § 2344). In particular, with respect to orders – such as the *Second R&O* and the *Reconsideration Order* – that are issued "in notice and comment * * * rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. §§ 552, 553, to be published in the Federal Register," such "entry" occurs upon "publication in the Federal Register." 47 C.F.R. § 1.4(b)(1). Petitions for judicial review of FCC rulemaking orders that are filed *before* Federal Register publication of such orders are "incurably premature" and must be dismissed. *Small Business in Telecommunications*, 251 F.3d at 1024; *see also Western Union Telegraph Co.*,

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[34] 28 U.S.C. § 2342(1).

[35] *Id.* § 2344 (emphasis added).

773 F.2d at 380 (holding that section 2344 "confers no jurisdiction over a petition challenging an agency order not yet entered when the petition is filed").

This Court has recognized, moreover, that finality with respect to judicial review of agency orders is a "party-based concept." *West Penn Power Co.*, 860 F.2d at 586. Thus, a properly entered order may be final and judicially reviewable with respect to an aggrieved petitioner even if requests for administrative reconsideration filed by *another* party are pending before the agency. But "the court of appeals cannot have jurisdiction over a petition for review when a petition for reconsideration brought by the *same* party is still pending before the agency." *Id.* at 587 (emphasis added).[36] As to such a party, the "pending petition for administrative reconsideration renders the underlying agency action nonfinal, and hence unreviewable," *TeleSTAR, Inc.*, 888 F.2d at 133, and the party must either withdraw its pending reconsideration request or await entry of a Commission order disposing of that request before filing a petition for review.[37]

These principles – that the Court lacks jurisdiction to consider petitions for review filed before the challenged order is properly "entered" and that an order is

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[36] *Accord Prometheus Radio Project v. FCC*, 373 F.3d 372, 420 n.56 (3d Cir. 2004); *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994); *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989); *Winter v. ICC*, 851 F.2d 1056 (8th Cir.), *cert. denied*, 488 U.S. 925 (1988).

[37] *See Prometheus Radio Project*, 373 F.3d at 420 n.56 (holding that a party's withdrawal of its administrative reconsideration petition and subsequent filing of a petition for review conferred jurisdiction on the Court); *West Penn Power Co.*, 860 F.2d at 588 (stating that petitioner could file a "new petition for review" once the agency acts on the pending reconsideration petition).

not final with respect to a party that has filed a reconsideration petition – combine on the facts of this case to deprive the Court of jurisdiction to consider petitioners' challenges both to the *Second R&O* and to the *Reconsideration Order*. A June 7 petition for review of the *Second R&O* (published in the Federal Register on May 4, 2006) would have been timely, except for the fact that in the meantime petitioners had filed a petition for administrative reconsideration of that order with the FCC.[38] That petition for administrative reconsideration made the *Second R&O* non-final and unreviewable as to petitioners (and tolled the time for seeking judicial review) until either they withdrew that petition or the Commission entered an order disposing of it.

Petitioners never formally withdrew their petition for administrative reconsideration. Instead, they maintained that the *Reconsideration Order* "effectively ruled on the merits of the arguments raised by Petitioners" in their petition for reconsideration. *See* Petition for Review, No. 06-2943, at 3 (June 7, 2006). Once the *Reconsideration Order* was formally entered, petitioners had ample time to file an additional petition for review. Under 28 U.S.C. § 2344 and the governing timing regulation (47 C.F.R. § 1.4(b)(1)), the Commission formally entered its *Reconsideration Order* on June 14, 2006 – the day it published a summary of that order in the Federal Register. *See* 71 Fed. Reg. 34272 (June 14, 2006). The entry of that order on June 14, 2006, also served to make the *Second R&O* final as to petitioners under governing principles of party-based finality.

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[38] Petition for Expedited Reconsideration, filed May 5, 2006 (JA 1279).

Petitioners, however, did not file a petition for review – either of the *Second R&O* or of the *Reconsideration Order* – after the *Reconsideration Order* was entered. Their only petition for review – filed in this Court on June 7, 2006 – was filed seven days *before* the *Reconsideration Order* was entered.[39] At that time, the *Second R&O* was non-final as to them because the *Reconsideration Order* had not been entered by publication in the Federal Register. In short, petitioners' challenge to the *Second R&O*, as modified by the *Reconsideration Order*, is incurably premature, and it must be dismissed for lack of jurisdiction. *West Penn Power Co.*, 860 F.2d at 586-87; *Small Business in Telecommunications*, 251 F.3d at 1024; *Western Union Telegraph Co.*, 773 F.2d at 380.[40]

II. THE COMMISSION LAWFULLY PROMULGATED ITS DESIGNATED ENTITY ELIGIBILITY RULES

Even if petitioners had filed a timely petition for review, they have failed to demonstrate that the Commission's DE eligibility rules violated the requirements

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[39] Petition for Review, 3d Circuit No. 06-2942, filed June 7, 2006.

[40] In their June 7, 2006, petition for review, petitioners nominally also sought review of the Commission's May 19, 2006, Public Notice, which petitioners characterize (Br. 4 n.2) as an "announce[ment] * * * postponing the start of Auction 66 until August 9, 2006." *See* Petition for Review, 3d Circuit No.06-2943, filed June 7, 2006. In their brief, however, petitioners make no effort to explain how that announcement is a reviewable final order, or, if it is, how that announcement aggrieves them. Indeed, petitioners identify no substantive defect in the Public Notice at all. Accordingly, petitioners' reference to that Public Notice in their petition for review provides no basis for relief independent of their untimely challenges to the *Second R&O* and *Reconsideration Order*.

of either the Administrative Procedure Act, the Communications Act, or the Regulatory Flexibility Act.

A. The Commission Provided Sufficient Notice And Opportunity For Comment

Petitioners contend that the Commission violated the Administrative Procedure Act by providing inadequate notice of the lease/resale-based eligibility restrictions and unjust-enrichment rules that it ultimately adopted in the *Second R&O* and the *Reconsideration Order*. Br. 20-27. This claim lacks merit.

As this Court has recognized, "submission of a proposed rule for comment does not of necessity bind an agency to undertake a new round of notice and comment before it adopts a rule which is different – even substantially different – from the proposed rule." *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977). Instead, the relevant inquiry is whether the notice "would fairly apprise interested persons of the 'subjects and issues' before the Agency," *id.*, or, stated differently, "whether the final rule was a logical outgrowth of the rulemaking proposal and record," *NVE, Inc. v. Dept. of Health and Human Services*, 436 F.3d 182, 191 (3d Cir. 2006) (citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991)).

In this case, the Commission's *Further Notice* and the record developed in response to it demonstrate that the agency provided sufficient notice of the pertinent subjects and issues to satisfy APA standards. In the *Further Notice*, the Commission made clear that it sought comments on ways to address abuse of the DE program beyond Council Tree's specific proposal. Indeed, it specifically

sought comment on leasing-related DE eligibility restrictions and on adjusting the unjust-enrichment rules.

(1) The *Further Notice* Sought Comment On Ways To Address Abuse Of The DE Program Beyond Restrictions Targeted At Incumbent Wireless Providers

In the *Further Notice*, the Commission sought comment on ways to address abuse of the DE program that went well beyond Council Tree's specific proposal regarding material relationships with large in-region wireless carriers – and also went beyond relationships with any discrete list of entities with significant interests in communications. Petitioners argue that the *Further Notice* was a narrowly targeted request for comment on whether, as Council Tree had proposed to the Commission, a "material relationship" with a "large in-region incumbent wireless provider" (or, alternatively, as the Commission had added, with a "large entity that has a significant interest in communications service") should disqualify an otherwise qualified DE from securing bidding credits in connection with auctions for wireless spectrum licenses. Br. 9-10. That assertion cannot be reconciled with what the Commission actually said in the *Further Notice*.

As an initial matter, the *Further Notice* used Council Tree's proposal not as a ceiling, but as a point of departure for considering rule changes. The Commission sought comment on "the *elements*" of Council Tree's proposal.[41] Those elements were (1) the types of operational or financial relationships that

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[41] *Further Notice* ¶ 1 (JA 61-62) (emphasis added).

should be restricted (Council Tree proposed "material relationships"), and (2) the entities to which such restrictions should apply (Council Tree proposed "large in-region incumbent wireless provider[s]"). The notice stated that the goal of the rulemaking was to ensure that DE benefits are "available only to bona fide small businesses,"[42] and to "prevent companies from circumventing the objectives of the designated entity eligibility rules."[43] Although the *Further Notice* offered the separate elements of Council Tree's proposal as a possible way to fulfill this goal, it specifically invited comment on proposals in addition to the one Council Tree offered.

For example, after discussing Council Tree's proposal, the Commission stated, "[a]dditionally," that "we seek comment on whether other 'material' relationships, *such as* those between an otherwise qualified designated entity and an 'entity with significant interests in communications services,' should trigger a restriction on the award of designated entity benefits." *Further Notice* ¶ 13 (JA 67) (emphasis added). Not only did the Commission set forth one possible alternative to Council Tree's proposal, the use of the words "such as" put interested persons on notice that limiting the eligibility restrictions to entities with significant interests

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[42] *Further Notice* ¶ 7 (JA 65). *See also id.* ("The Commission intends its small business provisions to be available only to bona fide small businesses. In this *Further Notice*, we tentatively conclude that modifications to our designated entity rules are warranted.").

[43] *Id.* ¶ 6 (JA 65).

in communications was one – but hardly the only – possible alternative to Council Tree's proposal the Commission was considering.

Similarly, the Commission asked whether Council Tree's proposal would "be sufficient to address any concerns that our designated entity program may be subject to potential abuse from larger corporate entities." *Further Notice* ¶ 15 (JA 68). By asking whether Council Tree's proposal was "sufficient," the Commission necessarily left open the possibility of adopting restrictions that went beyond those Council Tree sought.

Finally, the *Further Notice* asked whether there are "*additional entities* that we should consider including as part of our proposed definition" of entities whose material relationships with DEs should be limited. *Further Notice* ¶ 19 (JA 70) (emphasis added). Taken together, these statements from the *Further Notice* made clear that the FCC might adopt a rule different from the one Council Tree proposed – one that could affect relationships with entities other than large in-region wireless carriers or, even as the Commission had proposed, large companies with significant interests in communications. In short, the *Further Notice* was more than sufficient to "fairly apprise interested persons of the 'subjects and issues' before the Agency." *NVE, Inc.*, 436 F.3d at 191.

(2) The *Further Notice* Specifically Sought Comment On Eligibility Restrictions Regarding Leasing

The *Further Notice* did not simply contain a general statement of the FCC's interest in revisiting DE eligibility rules; it also expressly sought comment regarding possible restrictions on spectrum leasing. Specifically, the Commission

asked "what, if any, standard should be used to determine whether a spectrum leasing arrangement is a 'material relationship' for purposes of any additional restriction on the availability of designated entity benefits that we might adopt." *Further Notice* ¶ 16 (JA 68). The Commission also asked "whether other arrangements should be taken into account." *Id.*

Petitioners argue that the *Further Notice* focused only on leasing arrangements with large in-region wireless companies or companies with a significant interest in communications services. Br. 24-27. That claim is untenable in light of the fact that, as explained above, the *Further Notice* contemplated discussion of the rule's application to entities beyond those proposed by Council Tree. In any event, on its face, paragraph 16 of the *Further Notice* – which specifically invited comment on the standard to be used "to determine whether a spectrum leasing arrangement is a 'material relationship'" and which also asked about "additional restriction[s] on the availability of designated entity benefits" (JA 68) – easily encompasses the general leasing/resale-related eligibility restrictions that the Commission adopted.

Further insight is provided by examination of the Commission's conclusions in the *Secondary Markets Second Report and Order*, which the relevant portion of the *Further Notice* cites. *See Further Notice* ¶ 16 n.38 (JA 68). In that order, the FCC, relying on its interpretation of the purposes of section 309(j), stated that a DE "cannot make spectrum leasing its primary business and must * * * continue to provide facilities-based network services under its licenses." *Secondary Markets Second Report and Order* ¶ 76. The Commission determined that the statutory

goal of encouraging small business participation in the provision of spectrum-based services was intended "to facilitate [DEs'] ability to acquire licenses, build out systems, and provide service," not "to provide generalized economic assistance to small businesses." *Secondary Markets Second Report and Order* ¶ 70. Moreover, the Commission stressed, unfettered leasing by DEs "would be paving the way for the very unjust enrichment Congress wanted us to prevent." *Id.* ¶ 71.

Having made clear that a DE must be a facilities-based provider and not primarily a lessor of its spectrum, the only question left in the *Secondary Markets Second Report and Order* was how and where to draw the line. In this regard, the Commission said that if DE leased "substantially all" of its spectrum to a lessee, that lessee would become an attributable affiliate of the DE, which could compromise its DE status. *Id.* ¶ 77. "On the other hand," the Commission stated, a lease "involving a small portion of the [DE's] spectrum capacity" would "likely be permissible." *Id.* And the Commission determined that "[s]ituations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved." *Id.*

The Commission's express reference in the *Further Notice* (¶ 16 & n.38 (JA 68)) to this discussion from the *Secondary Markets Second Report and Order* provided an additional signal that the Commission not only was considering possible restrictions of DE leasing relationships, but also, notwithstanding petitioners' contrary argument (Br. 24 n.20), was concerned with line drawing with respect to such relationships. And comments in the record – including prominently those of petitioners Council Tree and MMTC – confirm that interested persons

understood that new eligibility restrictions concerning leasing and resale restrictions were a possibility. *See Reconsideration Order* ¶ 19 n.54 (JA 151) (citing record pleadings of Council Tree and MMTC). Indeed, in response to the *Further Notice*, several parties proposed rule changes that would apply to spectrum leases without regard to whether the lessee was a large wireless carrier. *See* NTCH Comments at 2, 8 (JA 663, 669) (proposing a "safe harbor" for certain post-auction spectrum leases); Wirefree Partners Comments at 8-10 (JA 759-61) (urging, among other things, that "[a] designated entity who elects to lease a portion of its spectrum must have a primary business other than spectrum leasing and not lease all its spectrum for the first five years").

(3) The *Further Notice* Sought Comment On Adjustments To The Unjust-Enrichment Rules

In the *Further Notice* (¶ 20 (JA 70)), the Commission also expressly sought comment on changing the unjust-enrichment rules. After noting Council Tree's request to apply a modified version of the then-current rules to its proposal, the Commission "s[ought] comment on whether, if we adopt a new restriction on the award of bidding credits to designated entities, we should adopt revisions to our unjust-enrichment rules such as those proposed by Council Tree, or in some other manner." *Id.* The Commission also asked, "If we require reimbursement by licensees that, either through a change of 'material relationships' or assignment or transfer of control of the license, lose their eligibility for a bidding credit pursuant to any eligibility provision we might adopt, over what portion of the license term should such unjust-enrichment rules apply?" *Id.*

By making this request for comment, the Commission gave notice that it might adopt an unjust-enrichment period longer than the five years then current for any new eligibility restriction that it might adopt in this proceeding. Petitioners argue, however, that there was insufficient notice that the Commission might adopt an unjust-enrichment period longer than five years with respect to the *existing* eligibility restrictions that the new rules supplemented. Br. 23-24.

Petitioners' argument fails because it was plainly foreseeable that any changes to the unjust-enrichment term that the Commission might adopt would be made consistent for all eligibility restrictions. As an initial matter, petitioners ignore the Commission's broad request for comment on whether it should adopt unjust enrichment revisions "such as those proposed by Council Tree, *or in some other manner*." *Further Notice* ¶ 20 (JA 70) (emphasis added). The Commission's statement made clear that it did not intend to limit discussion of the unjust-enrichment issue to the concerns raised by Council Tree's proposal.

Moreover, the Commission has *never* had inconsistent unjust-enrichment terms with respect to bidding credits, and for good reason. A regime that had shorter unjust-enrichment periods for some qualification restrictions than for others would be illogical and would create skewed incentives to enter into particular kinds of relationships even if others were more economically efficient. *See Reconsideration Order* ¶ 35 (JA 155). For example, it would make no sense to allow a DE to retain the full value of its bidding credits if it sells its license to a non-DE in year six but to require some repayment if the DE instead leases its spectrum in that year. Thus, reasonable readers would have understood the

Further Notice to have sought comment on the appropriate unjust-enrichment period to apply whenever DE eligibility is lost under the rules, whether because of the additional revisions to the eligibility requirements, or otherwise. At the very least, given the Commission's consistent treatment of unjust-enrichment terms, changing the term across the board was a logical outgrowth of the issue that the Commission identified.

Petitioners themselves recognized the need for consistency. Thus, Council Tree argued for consistent treatment – retaining the earlier five-year unjust-enrichment term across the board. Council Tree Comments at 57-59 (JA 497-99). Petitioner MMTC went further. It urged the Commission to consider extending the term to ten years or longer for all eligibility restrictions:

> To many of those who have used the DE program to expand their spectrum and market position, this [five-year] penalty may be viewed as a cost of doing business and not as a meaningful deterrent. Therefore, the Commission should consider initiating an inquiry to adjust its reimbursement obligations to require repayment of 100 percent of the value of the bidding credit. In addition, the Commission should consider expanding the unjust enrichment standard to encompass the entire license term and not just the first five years, as Council Tree recommends.

MMTC Comments at 3, 15 (JA 574, 586).[44] In these circumstances, petitioners cannot plausibly claim that they were provided inadequate notice of the possibility that the Commission would adopt the unjust enrichment changes that it did. *See Fertilizer Institute v. Browner*, 163 F.3d 774, 780 (3d Cir. 1998) (holding notice to

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[44] Although MMTC asked the FCC to "consider" lengthening unjust enrichment terms in a further proceeding, it also said that such reform was necessary "to restore the legitimacy of the DE program." *Id.*

be sufficient in case in which "at least one commenter" addressed the pertinent issue).

B. The Commission's Revised DE Rules Are Reasonable And Consistent With The Communications Act

Petitioners contend that the Commission's decision to adopt the lease/resale-related eligibility restrictions and the ten-year unjust-enrichment schedule was arbitrary and contrary to the Communications Act provisions governing wireless auctions. As discussed below, petitioners' arguments fail on their own terms.

(1) The FCC's Amended DE Rules Reasonably Implement The Auction Provisions Of The Communications Act

Section 309(j)(3) of the Communications Act requires the FCC to balance competing statutory goals as it establishes rules for its DE program. *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999); *Melcher v. FCC*, 134 F.3d 1143, 1153-55 (D.C. Cir. 1998). In implementing these goals, the Commission not only must seek to "ensure that small businesses [and] rural telephone companies * * * are given the opportunity to participate in the provision of spectrum-based services"; it also must impose "performance requirements" on successful bidders, and adopt such "antitrafficking restrictions . . . as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses." 47 U.S.C. § 309(j)(4). The statute leaves to the Commission the choice of specific "bidding methodology." *Id.* § 309(j)(3).

As it must,[45] the Commission has modified and refined its DE rules over the years to balance these goals in light of its experience in successive auctions. *See generally Second R&O* ¶¶ 7-13 (JA 85-88). The amended rules – which seek to promote auction participation by DEs while limiting the opportunities for abuses that had developed under the preexisting rules (*see* pages 8-12, above) – reflect the Commission's reasonable judgment on how best to balance the statutory goals in light of past experience, the record before it, and the acknowledged urgency of proceeding with the AWS auction without delay. *See Reconsideration Order* ¶¶ 12, 39-40 (JA 148, 156-58). As such, the rules are within the Commission's statutory discretion and are not arbitrary or capricious. *See Fresno Mobile Radio*, 165 F.3d at 971 (holding that the Commission's predictive judgment regarding how best to balance the objectives of section 309(j) is entitled to deference). Petitioners may be unhappy that the balance struck by the Commission is not the one Council Tree proposed, but that does not make the Commission's rules legally infirm.[46]

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[45] *See Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) ("The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience.").

[46] The reasonable balance the Commission struck in implementing the DE program under section 309(j) also satisfies the overlapping goals of 47 U.S.C. § 257, to which petitioners fleetingly refer. Br. 45-46.

(a) The Lease/Resale Restrictions Reflect A Reasonable Application Of Statutory Goals

Council Tree proposed that the Commission reform its DE rules, among other things, to restrict both operational relationships (including leasing and resale) and financial relationships between DEs and large in-region wireless carriers, claiming that such restriction would give DEs themselves the opportunity to provide wireless services without domination from incumbent wireless partners.[47]

In the face of significant disagreement on the precise scope that reform should take (*see* pages 9-12, above), the Commission limited its initial reforms to the subset of material relationships identified by Council Tree that involved lease and resale, while applying those restrictions to a broader set of entities than Council Tree had proposed. *See Second R&O* ¶¶ 3-5 (JA 83-85). However, by limiting eligibility with respect to arrangements that involve the lease or resale of a majority of a DE's spectrum, the restrictions that the Commission adopted nevertheless directly addressed the problem about which Council Tree and others had complained – that DE benefits were not being used effectively to serve the statutory goal of giving small businesses "the opportunity to participate in the

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[47] *See* Letter, dated June 13, 2005, from Steve C. Hillard and George T. Laub, Council Tree, to FCC Secretary, at 6 (noting that without restrictions limiting partnering relationships with large wireless carriers, new entrant success will "wither" and DEs themselves "will become dominated by high net worth individuals * * * who have no need for government assistance"); *Second R&O* ¶ 16 (JA 89) (noting that "Council Tree initially proposed that the Commission should restrict a designated entity applicant's 'material relationships,' including both financial and operational agreements, in order to more carefully ensure that designated entity benefits are awarded only to bona fide eligible entities.").

provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). Requiring that DEs actually use the majority of their spectrum to provide their own services targets the DE program more precisely to that statutory goal.

Petitioners argue that the Commission acted arbitrarily in restricting the leasing freedom of DEs as compared to other licensees. But the Commission has always made clear that, while DEs are as free as other carriers to engage in leasing and resale, DEs must remain primarily facilities-based providers in order to retain DE benefits. Thus, in its *Secondary Markets* proceeding, the Commission cautioned DEs that they could not use their benefits to become pure lessors of spectrum. The Commission explained that, although "Section 309(j) requires, among other things, that the Commission ensure that small businesses are given the opportunity to participate in the provision of spectrum-based services, . . . [t]hese statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, *build out systems, and provide service*."[48] The Commission also noted that Congress had made clear its intent to "deter participation in the licensing process by those who have no intention of offering service to the public," and declared that it could not disregard Congress' stated intent "that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license."[49]

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[48] *Secondary Markets Second Report and Order* ¶ 70 (emphasis added).

[49] *Id.* ¶ 71 (citations omitted).

Indeed, the Act expressly links the goal of encouraging small-business participation to the goal of "ensuring that new and innovative technologies are readily accessible to the American people." *See* 47 U.S.C. § 309(j)(3)(B). As the Commission has observed, section 309(j) reveals a congressional preference for DEs that will actually use the spectrum, at least in part, to offer services to their own end users.[50] The Commission thus acted entirely consistently with its own prior policies and the statutory goals in revising its rules to permit DEs to continue to lease their spectrum liberally, but subject to a limit of 50 percent of the capacity of any license.[51] A DE applicant that intends to lease 49 percent of its capacity can still be eligible for DE benefits. And while lessees of more than 25 percent of a DE's spectrum under a license have their revenues attributed to the DE for purposes of determining eligibility for DE benefits, such leases are not by themselves prohibited.[52]

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[50] *Second R&O* ¶ 27 (JA 93) (citing *Secondary Markets Second Report and Order* ¶¶ 71, 76, 82).

[51] *See Second R&O* ¶¶ 15, 25 (JA 89, 92).

[52] Moreover, nothing in the *Second R&O* alters the rules permitting non-DEs, including banks, other financial institutions, and other carriers, to provide significant capital to DEs in the form of equity or debt investments, so long as they do not possess either *de jure* or *de facto* control over the DE. *See* 47 C.F.R. § 1.2110.

(b) The Unjust-Enrichment Restrictions Reflect A Reasonable Application Of Statutory Goals

The Commission's revised unjust-enrichment rule is likewise a reasonable exercise of FCC authority. As an initial matter, petitioners (Br. 29) mischaracterize the regulation in calling it a "10-Year Hold Rule." Contrary to petitioners' suggestion, the rules do not impose a mandatory holding period. They merely provide that, if a DE sells its license to a non-DE within the license period or ceases itself to be a qualified DE, it loses some or all of the benefits it received because of its DE status. *See Second R&O* ¶ 37 (JA 96). A DE licensee may also sell to another qualified DE at any time, without making an unjust enrichment payment.

The unjust-enrichment rule, moreover, fits comfortably within the Commission's historical practice. From the outset, the Commission has prescribed an unjust-enrichment period to ensure that DEs do not quickly resell, or "flip," their licenses to non-DEs, and thus become "unjustly enriched" by the statutory benefits that are reserved for eligible small businesses. As with the leasing-related eligibility rules, the Commission's unjust-enrichment period is designed to ensure that only DEs with a genuine interest in building out their systems and providing service enjoy DE benefits.[53]

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[53] *Secondary Markets Second Report and Order* ¶ 71 ("[T]he reason for imposing * * * unjust enrichment payment obligations on entities that receive small business benefits is to deter 'participation in the licensing process by those who have no intention of offering service to the public.").

As petitioners acknowledge (Br. 7 n.7, 29-30), the Commission has in the past prescribed 10-year unjust-enrichment periods—in some cases with more restrictive features than those in the current rules. For example, in Auctions 5, 10, and 11, the Commission prescribed a 10-year period that, unlike the newly amended rule, had no reduction in the repayment obligation in the later years. *See* p. 7 & n.9, above. The newly amended unjust-enrichment rule thus occupies a middle ground between the more restrictive rules in earlier auctions and the five-year period that applied later on. And, as we have noted, petitioner MMTC itself supported a 10-year unjust enrichment period as necessary "to restore the legitimacy of the DE program." MMTC Comments at 3, 15 (JA 574, 586).

(c) The Commission Reasonably Determined That The Revised DE Rules Would Preserve For DEs An Opportunity To Participate In The Provision Of Spectrum-Based Services

Petitioners argue that, taken together, the revised eligibility restrictions and strengthened unjust-enrichment rule deny DEs access to the capital needed to participate in the auctions program, and that the Commission unlawfully failed to evaluate this risk. *See generally* Br. 27-46. These claims are baseless.

Petitioners claim, first, that the Commission's resale-related eligibility restrictions impose a particular burden on DEs because they force DEs to provide retail service – allegedly the most expensive way to enter the market. Br. 38-39. But the statute is designed to promote "significant involvement in the provision of services to the public, not merely passive ownership of a license to spectrum used

by others to provide service." *Reconsideration Order* ¶ 3 n.8 (JA 144) (citing H.R. Rep. No. 103-111, at 257-58 (1993)). And petitioners themselves contended that resale arrangements could be subject to abuse and should be restricted. *Reconsideration Order* ¶ 19 n.54 (JA 151) (citing Council Tree Reply at 17-18, 31 (JA 873-74, 887); MMTC Comments at 6 n.16 (JA 577-78)). In any event, the restrictions the Commission adopted do not prohibit lease/resale arrangements altogether – they merely limit the portion of a DE licensee's spectrum that may be resold/leased to ensure that DEs are primarily serving their own end user customers.

Petitioners also contend – in tension with petitioner MMTC's endorsement of such a rule below (MMTC Comments at 15 (JA 586) – that the 10-year unjust enrichment period the Commission established is incompatible with the investment horizons of venture capital and private equity investors, which assertedly do not extend beyond six years. Br. 31-32. As this Court noted in the *Stay Denial Order* (at 5 n.2), however, "[p]rivate equity and venture capital investors represent only one source (albeit a significant one) of capital for DEs."[54] Moreover, even as to such investors, the Commission found not to be credible predictions that they would avoid investing in DEs if they could not reap the full benefit of bidding credit discounts on AWS licenses within six years, given evidence that investors in other spectrum licenses did not even expect to recover their investment and turn a

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[54] The Court observed that even Council Tree agreed that "entities with significant interests in communications services also serve as valuable sources for capital for DEs." *Id.*

profit for 30 years. *Reconsideration Order* ¶ 39 (JA 157). In any event, the Commission stressed that DE benefits "are offered to ensure that small businesses have an opportunity to participate in the provision of spectrum-based services, not to ensure the short-term 'exit strategies' of parties providing capital." *Id.*

Finally, petitioners' complaints about the revised DE rules ignore the fact that the Communications Act gives the Commission discretion to choose how to promote DE participation in spectrum auctions, and that the Commission did not simply adopt the challenged rules in isolation. At the same time that it adopted the challenged rules, it took several other steps to encourage DE participation in Auction 66. For example, the FCC used not only bidding credits, but also a range of geographic licensing areas and spectrum block sizes to promote DE participation.[55] These measures reflect the economic reality that smaller entities may have more success in winning smaller licenses, as well as the statutory goal to encourage deployment of services in rural areas. *See* 47 U.S.C. § 309(j)(3)(A). Petitioners attempt to belittle these measures, claiming that smaller licenses are less desirable. But the alleged interest of these particular petitioners "in more congested, more expensive mid-sized and major markets" (Br. 52 n.64) is not controlling. The Commission's duty is to balance the various goals of the Act in a manner suited to serve the public interest. Its effort to do so, viewed both rule by rule and as an overall program, was reasonable.

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[55] *AWS Service Rules Reconsideration Order* ¶¶ 5-21.

(2) Petitioners' Reliance On Post-Record Auction Results Is Factually Misleading And Legally Irrelevant

Petitioners attempt to support their argument that the Commission's revised rules are arbitrary or otherwise unlawful with a presentation of post-record statistics that, they claim, demonstrates that, "measured against historic standards," the actual results of the AWS auction reflect DE performance that is "dismal at best" and "the exact opposite of the robust participation contemplated by Section 309(j) of the Communications Act." Br. 50-51; *see also id.* 15-16, 43 n.53, 50-54; Supplemental App. Tabs 1-5. Petitioners' statistical claims are meritless.

As an initial matter, petitioners' claims are factually misleading. As previously noted, by any objective standard, DEs participated substantially in the AWS auction. DEs comprised 100 out of the 168 qualified bidders and 57 out of the 104 winning bidders.[56] And two DEs – Denali Spectrum Licensee, LLC ("Denali") and Barat Wireless, L.P. – placed among the top ten bidders in the auction in terms of the dollar amounts of their net provisionally winning bids.[57]

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[56] *Auction Closure Notice*, Attachment A.

[57] *Id.* Denali's short-form application disclosed that Council Tree Communications, Inc. and Council Tree Alaska Native Wireless, LLC and their principals (Steve Hillard, George Laub, and Jonathan Glass) are parties to one or more of seven agreements with Denali, its owners and affiliates. Denali's application also disclosed that Council Tree Alaska Native Wireless is an affiliate of Doyon, Ltd, which the application identified as a controlling interest of Denali. *See* Auction 66, File No. 0002605611 – Denali Spectrum License, LLC, available at https://auctionfiling.fcc.gov/form175/search175/index.htm (last updated 10/12/06).

Petitioners' attempt (Br. 15-16, 43 n.53, 50-54; Supplemental App. Tab 5) to dismiss these results with reference to the results of prior auctions for broadband PCS licenses does not provide a valid basis for comparison. While petitioners emphasize that DEs in this auction won less in terms of dollar amounts than in some prior auctions, they ignore that those earlier auctions were full of DEs that petitioners themselves have claimed had no business obtaining DE benefits. In Auction 35, for example, the second, third, and ninth highest bidders (ranked according to net winning bid amounts),[58] and in Auction 58, the second, fourth, fifth, and seventh highest such bidders[59] had partnering relationships with large in-region wireless carriers that would have disqualified those entities under the

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[58] *See* Council Tree Comments, Attachment 1 (JA 504) (listing Alaska Native Wireless, LLC (partnered with AT&T Wireless), Salmon PCS, LLC (partnered with Cingular) and SVC BidCo, L.P. (partnered with Sprint); Auction 35 C and F Block Broadband PCS, Bidders, sorted by Total Net High Bids and High Bids, available at http://wireless.fcc.gov/auctions/35/charts/35press3.pdf (last updated 10/12/06).

[59] *See* Council Tree Comments, Attachment 1 (JA 504) (listing Vista PCS (partnered with Verizon Wireless), Cook Inlet/VS GSM VII PCS (partnered with T-Mobile), Edge Mobile (partnered with Cingular), and Wirefree Partners III (partnered with Sprint); Auction 58 Broadband PCS, Bidders sorted by Total Net Bids and High Bids, available at http://wireless.fcc.gov/auctions/58/charts/58press3.pdf (last updated 10/12/06).

criteria Council Tree proposed.[60] Moreover, many of the DEs who won licenses in these earlier auctions have sold their licenses to large wireless companies. For example, Salmon PCS, which won 45 licenses in Auction 35, has sold them all to Cingular. Northcoast Communications sold numerous licenses won in Auctions 11 and 35 to Verizon Wireless.

In any case, meaningful comparisons between "designated entities" in the broadband PCS auctions (either individually or as a set) and the AWS auction are extremely difficult, if not impossible, to make. Over the dozen years during which the Commission held the broadband PCS and AWS auctions, the Commission's definition of designated entities changed to such an extent that – for reasons unrelated to the rule changes adopted in the *Second R&O* – the DE "entrepreneurs" in the initial broadband PCS auctions comprised a very different class of entities than the DEs receiving bidding credits in the AWS auction.[61]

Moreover, as petitioners acknowledge (Br. 52), in each of the cited PCS auctions, some or all of the spectrum was set aside for DEs. Designated entity

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[60] Petitioners make no effort to explain what the results of the cited PCS auctions would have been had their own preferred plan to restrict material relationships between DEs and large in-region wireless carriers been in effect for those auctions. Such a rule – about which petitioners are in no position to complain – would have depressed DE performance in past auctions (at least by petitioners' measure) and narrowed, if not eliminated, the statistical gap between DE performance in the PCS and AWS auctions on which petitioners seek to rely.

[61] *See* 47 C.F.R. § 24.709(a) (1997) (defining "designated entities" and "entrepreneurs" by the revenues and assets attributed to the applicant); *see also Second R&O* ¶¶ 10-12 (JA 86-88) (describing evolution from "control group" attribution rules to "controlling interest" attribution rules).

performance in such auctions – in which they were totally or partly shielded from competition from other bidders – plainly provides no basis on which to assess the relative effectiveness of the regime of open bidding (with DE bidding credits) that the Commission implemented with respect to the AWS auction.[62] Further distorting the comparison, petitioners omit the results of Auction 4, in which the Commission awarded licenses for fully half of all PCS spectrum while providing no DE benefits at all.[63] The omission of the Auction 4 results almost certainly provides an overstated view of overall DE performance in obtaining PCS licenses.

Importantly, petitioners' reliance on post-record AWS auction statistics also is legally irrelevant. At most, the statistics support the contention that the Commission's assessment of its new DE rules "appears *ex post* to have been

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[62] These results also ignore the fact that the DE program in place during the PCS auctions was not an unalloyed success. Winning DE bidders for PCS licenses encountered significant financial difficulties, leading to requests for relief and defaults on winning bids. *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 12 FCC Rcd 16434, 16441-47 (¶¶ 8-20) (1996). Indeed, Auction Nos. 10, 22, 35, and 58 consisted almost entirely of licenses for spectrum previously assigned to licenses won in earlier auctions. *See* 18 Defaulted PCS Licenses to be Reauctioned, *Public Notice*, 11 FCC Rcd 22204 (1996) (Auction No. 10); C Block PCS Spectrum Auction Scheduled for March 23, 1999, *Public Notice*, 13 FCC Rcd 24947 (1998) (Auction No. 22); C and F Block Broadband PCS Spectrum Auction Scheduled for July 26, 2000, *Public Notice*, 15 FCC Rcd 4702 (2000) (Auction No. 35); Broadband PCS Spectrum Auction Scheduled for January 12, 2005, *Public Notice*, 19 FCC Rcd 10243 (2004) (Auction No. 58).

[63] *See generally Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 9 FCC Rcd 5532 (¶¶ 6-21) (1994) (outlining Commission's approach to entire broadband PCS band, including blocks open to all applicants and blocks set aside for entrepreneurs).

mistaken"; they have no bearing on the only legally relevant inquiry – whether "the Commission's decision was unreasonable *ex ante*." *Fresno Mobile Radio,* 165 F.3d at 971. In *Fresno Mobile*, the D.C. Circuit rejected an indistinguishable claim that earlier revisions to the DE rules were unreasonable "because the method chosen did not turn out to be successful at allocating licenses among a wide variety of applicants." *Id.* The court stressed that the FCC's "predictive judgment" regarding the effect of its DE rules was "entitled to particularly deferential review," and that because the petitioner's argument was "not a challenge to the reasonableness of the agency's decision on the basis of the record then before it, Fresno's claim must fail." *Id.* Petitioners' hindsight-based claim should be rejected for the same reason.

Of course, even if it had been clear *ex ante* that the rules would reduce DE participation in the AWS auction, that result would have no necessary bearing on the lawfulness of the Commission's action. Section 309(j) speaks of giving DEs an opportunity to participate in the provision of "'spectrum-based services' as a unit;" it does *not* require that DEs "must have access to *each* spectrum-based service." *Melcher v. FCC*, 134 F.3d at 1155 (emphasis in original) (citing sections 309(j)(4)(D) & 309(j)(3)(B)). As petitioners themselves emphasize (Br. 35, 51-52), DEs have been very successful over the years in winning licenses at auction, including licenses for broadband PCS spectrum functionally equivalent to the AWS spectrum at issue here. Given DEs' major stake in spectrum obtained in past spectrum auctions – and given the fact that the rules under review were expressly designed to *restrict* eligibility in the face of acknowledged abuses of the DE

program – diminished DE performance in the AWS auction would provide no valid basis to question the lawfulness of the Commission's action.

(3) The Commission Fully Complied With The Regulatory Flexibility Act

The Commission's orders fully complied with the procedural requirements of the Regulatory Flexibility Act (RFA). The *Further Notice* included an Initial Regulatory Flexibility Analysis (IRFA) as required by section 603 of the RFA, 5 U.S.C. § 603. *See* JA 74-77. Pursuant to section 604 of the RFA, 5 U.S.C. §§ 604(a)(1)-(5), the Commission's *Second R&O* included a Final Regulatory Flexibility Analysis (FRFA), including a response to the RFA comments raised by one party (who is not a petitioner before this court). *See* JA 129-32.[64] And the *Reconsideration Order* (¶¶ 43-44 (JA 159-60) addressed petitioners' newly-raised RFA claims. The Commission thus met the requirements of the RFA.

Petitioners challenge the Commission's compliance with the RFA on two grounds. First, they maintain (Br. 47-48) that the IRFA was insufficient and consequently the FRFA must be deemed legally deficient. As we have explained, the Commission's rules were adopted after full opportunity for notice and

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[64] Petitioners err in suggesting (Br. 49 n.61) that the Commission was required to adopt the request of the RFA commenter. The RFA requires consideration of comments but does not require that the agency adopt any particular suggestion. *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001).

comment by the public on the proposed rules.[65] Besides seeking comment on proposals for modifying the DE rules, the *Further Notice* (¶ 25 (JA 72)) specifically sought comment from small entities on the IRFA's discussion of the impact of the proposals on small entities. The FRFA contained in the *Second R&O* (JA 129-32) noted and responded to the one regulatory flexibility comment filed. Petitioners' RFA arguments raised on reconsideration before the Commission were then fully addressed in the *Reconsideration Order* ¶¶ 43-44 (JA 159-60), supplementing the *Second R&O*'s FRFA. The Commission thus "demonstrate[ed] a 'reasonable, good-faith effort to carry out [RFA's] mandate,'"[66] which is all the RFA requires.

Second, contrary to petitioners' assertion (Br. 49), the Commission fully discussed and considered significant alternatives to the rules in the FRFA and elsewhere in the *Second R&O*. *See Second R&O* ¶¶ 14-41 (JA 88-98); *id.*, App. C,

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[65] Petitioners' reliance (Br. 48 n.59) on *United States Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), is misplaced. In *United States Telecom*, the Commission did not perform regulatory flexibility analyses because it adopted a rule without notice and comment. The court, however, concluded notice and comment was required and remanded the proceeding to the Commission to perform regulatory flexibility analyses. In the instant case, the Commission afforded the public an opportunity for notice and comment, and fully performed its duties under the RFA.

[66] *United States Cellular*, 254 F.3d at 88 (quoting *Alenco Comm., Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000)). Petitioners' citation (Br. 48 n.60) to *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998), is inapposite, as that case involved the agency's erroneous certification that no regulatory flexibility analysis was needed, an error that led the courts to conclude that the FRFAs were inadequate. Here, the Commission issued an IRFA, a supplemental IRFA, a FRFA, and a response to its regulatory flexibility analyses, in full compliance with 5 U.S.C. §§ 603 and 604.

Section E (JA 130-31), as supplemented by the *Reconsideration Order* ¶ 44 (JA 159-60). The RFA only requires a "description" by the agency of steps taken to minimize significant economic impact on small entities, and consideration of alternatives. 5 U.S.C. § 604(a)(5). The Commission's extensive discussion of its reasons for adopting the DE rules and rejecting other proposals more than adequately meets the RFA's requirements. *See* 5 U.S.C. § 605(a) (RFA does not require duplicative analysis).

III. Vacatur Of The New DE Rules Or Setting Aside The Auction 66 Results Is Not Warranted

The Court should reject petitioners' request (Br. 49-50, 55) that it vacate the revised DE rules and set aside the result of Auction 66. Although within the Court's remedial powers, that remedy would be unwarranted even if the notice and explanation that the Commission provided in adopting those rules had not satisfied the APA.

Courts apply an equitable balancing test in determining whether to vacate, or to remand without vacating, agency orders that are found to be unlawful. Under that test, "the decision to remand or vacate hinges upon the court's assessment of 'the seriousness of the . . . deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)).

Applying that test here, a failure of notice or of adequate explanation provides no basis for concluding that the FCC would be unable to readopt the same rules in subsequent administrative proceedings after providing further notice or explanation. In similar circumstances, courts have declined to vacate rules adopted without adequate notice and opportunity for comment when the equities weigh in favor of keeping them in place pending remand.[67]

Moreover, even if vacatur of the DE rules were appropriate, there would be no basis for undoing the AWS auction. Undoing the auction months after it occurred would be extremely disruptive to the government users awaiting relocation, as well as to the many successful bidders who already have made substantial investments to utilize the spectrum associated with their new licenses, and it would delay the provision of important new services to the public. As this Court recognized in denying petitioners' request for a stay pending judicial review:

> The public interest * * * militates strongly in favor of letting the auction proceed without altering the rules of the game at this late date. As the FCC and the Intervenors note, this auction represents the culmination of an 18-month process of [preparing for the relocation of] government users from the spectrum that is the subject of Auction 66, and will advance the public interest by helping to modernize the nation's broadband infrastructure, which lags dramatically behind other industrialized nations. * * * All of the parties, including Petitioners, that have spoken on this issue have emphasized the importance of proceeding with the auction this summer.

Stay Denial Order at 6 (citations and internal quotations omitted). The same

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[67] *See Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995); *Western Oil and Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

considerations properly apply in determining whether the auction should be unwound now that it has occurred.[68]

Petitioners cite two cases in which auction results were set aside following judicial review (Br. 54 n.66), but neither is pertinent here. In the *NextWave* litigation, the Commission had revoked licenses already held by NextWave and had reauctioned them to others. The D.C. Circuit held that the Commission had "violated" the Bankruptcy Code in canceling Nextwave's licenses, and it directed the FCC to conduct "proceedings not inconsistent with this opinion." *NextWave Personal Communications v. FCC*, 254 F.3d 130, 156 (D.C. Cir. 2001), *aff'd*, 537 U.S. 293 (2003). To carry out the court's mandate, the Commission itself unwound the auction. No question of unlawfully depriving parties of existing property interests is presented here. Similarly, in *Northpoint Technology, Ltd v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005), the Court determined that the Commission lacked statutory authority to conduct the auction at issue. By contrast, petitioners have not challenged the Commission's statutory authority in this case.

Finally, the remedy of setting aside the AWS auction should not be adopted if, as here, less disruptive remedies, such as providing petitioners with access to

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[68] *See International Union, United Mine Workers of America v. Federal Mine Safety and Health Administration*, 920 F.2d 960, 967 (D.C. Cir. 1990) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)) (balancing of equitable factors relevant to selecting an appropriate remedy is analogous to the inquiry courts undertake in deciding whether to grant preliminary injunctive relief).

alternative spectrum, are available. *See Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376-77 (D.C. Cir. 1999) (indicating that the FCC could make Qualcomm whole by making alternative spectrum available rather than divesting Sprint of a license to spectrum won at auction). In this regard, even in the absence of specific court-ordered relief, petitioners would likely have other chances to purchase licenses as a DE.[69]

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[69] Congress has required 60 megahertz of spectrum in the 700 MHz band to be auctioned by January 2008. *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. In the alternative, the petition should be denied.

Respectfully submitted,

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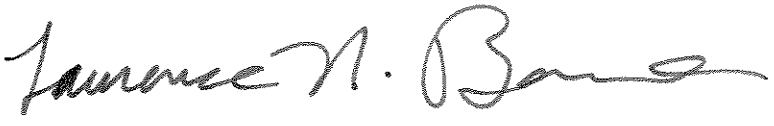

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October 13, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

COUNCIL TREE Communications, Inc., Bethel Native Corporation, and the Minority Media and Telecommunications Council, PETITIONERS, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 06-2943

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13962 words. I further certify that the text of the E-Brief (in PDF format) and the text of the hard copies of the brief are identical. I further certify that a virus scan was performed on the electronic version using Symantec Anti-Virus Corporate Edition Version 10 and that no viruses were detected in the file.

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October 13, 2006

STATUTORY APPENDIX

Contents:

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 158--ORDERS OF FEDERAL AGENCIES; REVIEW
→§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, and 841a [FN1]) or pursuant to part B or C of subtitle IV of title 49; and

(B) the Federal Maritime Commission issued pursuant to--

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d) [FN2];

[(iv) and (v) Redesignated (ii) and (iii)]

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

[FN1] So in original. The reference to "814a" probably should not appear.

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[FN2] So in original. Probably should be followed by a closing parenthesis.

Derivation:	United States Code	Revised Statutes and Statutes at Large
	5 U.S.C. 1032	Dec. 29, 1950, c. 1189, § 2, 64 Stat. 1129. Aug. 30, 1954, c. 1073, § 2(b), 68 Stat. 961.

Current through P.L. 109-12, approved 05/05/05

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UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 158--ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

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CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART A--GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

Current through September 12, 2005; 70 FR 53736

§ 1.4 Computation of time.

(b) General Rule--Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. See § 1.4(b)(1)-(5), below. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled "Public Notice" shall be calculated in accordance with this section. See § 1.4(b)(4) for a description of the "Public Notice" document. Unless otherwise provided in § § 1.4(g) and (h), it is immaterial whether the first day is a "holiday." See § 1.4(e)(1) for definition of "holiday." For purposes of this section, the term "public notice" means the date of any of the following events:

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register.

Example 1: A document in a Commission rule making proceeding is published in the Federal Register on Wednesday, May 6, 1987. Public notice commences on Wednesday, May 6, 1987. The first day to be counted in computing the beginning date of a period of time for action in response to the document is Thursday, May 7, 1987, the "day after the day" of public notice.

Example 2: Section 1.429(e) provides that when a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the Federal Register. Section 1.429(f) provides that oppositions to a petition for reconsideration shall be filed within 15 days after public notice of the petition's filing in the Federal Register. Public notice of the filing of a petition for reconsideration is published in the Federal Register on Wednesday, June 10, 1987. For purposes of computing the filing period for an opposition, the first day to be counted is Thursday, June 11, 1987, which is the day after the date of public notice. Therefore, oppositions to the reconsideration petition must be filed by Thursday, June 25, 1987, 15 days later.

Note to paragraph (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Council Tree Communications, Inc., et al., Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing "Printed Brief For Respondents" was served this 13th day of October, 2006, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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